IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

NEW PRIME, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 16-3407-CV-S-SRB
	)	
EATON CORPORATION,	)	
	)	
Defendant.	)	

ORDER

Before the Court is Eaton Corporation's Motion to Dismiss. (Doc. #10). For the reasons stated below, the motion is granted.

I. Background

Plaintiff names Eaton Corporation and John Does 1-100 as Defendants. Though the Complaint does not specify which claims are brought against which Defendant, the Complaint includes the following claims: Count I – Monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2; Count II – Exclusionary and Eliminative Conduct in Violation of Section 3 of the Clayton Act, 15 U.S.C. § 14; Count III – Exclusionary Conduct and Combinative Activity in Violation of Section 1 of the Sherman Act, 15 U.S.C. § 1; Count IV – Fraud; Count V – Unfair Competition; and Count VI – Unjust Enrichment. The essence of Plaintiff's claims is that Defendant Eaton monopolized the Class 8 truck transmission market and conspired with John Does 1-100, "unidentified truck manufactures (sic) and/or distributors," in furtherance of the monopolization thereby causing Plaintiff to overpay for vehicles that contained such transmissions. (Doc. #1, pp. 2-3).

Defendant Eaton moves to dismiss the Complaint in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Defendant Eaton argues: 1) Plaintiff is barred from stating antitrust claims or derivative state common-law claims because Plaintiff is an indirect purchaser; 2) all of Plaintiff's claims are barred by the applicable statute of limitations; 3) Plaintiff's antitrust claims are defective as a matter of law because Plaintiff fails to adequately plead antitrust injury or facts supporting an anticompetitive agreement between any manufacturers/distributors; 4) Plaintiff's unjust enrichment, fraud, and unfair competition claims are defective as a matter of law because Plaintiff fails to identify which state's law applies; and 5) Plaintiff fails to plead fraud with the particularity required by Federal Rule of Civil Procedure 9(b). The Court finds Defendant Eaton's first, second, and fifth arguments are dispositive and warrant dismissal.

II. Legal Standard

Pursuant to Fed. R. Civ. P. 12(b)(6), a claim may be dismissed for "failure to state a claim upon which relief can be granted." "To survive a motion to dismiss [for failure to state a claim], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (internal citations omitted); *Zink v. Lombardi*, 783 F.3d 1089, 1098 (8th Cir. 2015). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ash v. Anderson Merchs., LLC*, 799 F.3d 957, 960 (8th Cir. 2015) (quoting *Iqbal*, 556 U.S. at 678) (internal quotations omitted).

The Court must consider all facts alleged in the Complaint as true when considering a motion to dismiss. *See Data Mfg., Inc. v. United Parcel Service, Inc.*, 557 F.3d 849, 851 (8th

Cir. 2009) (noting "[t]he factual allegations of a complaint are assumed true and construed in favor of the plaintiff, even if it strikes a savvy judge that actual proof of those facts is improbable"). However, allegations that are "legal conclusions or formulaic recitation of the elements of a cause of action . . . may properly be set aside." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 677) (internal citations omitted). "In addressing a motion to dismiss, the court may consider the pleadings themselves, material embraced by the pleadings, exhibits attached to the pleadings, and matters of public record." *Illig v. Union Elec. Co.*, 652 F.3d 971, 976 (8th Cir. 2011) (internal quotations omitted).

"[I]n considering a 12(b)(6) motion based on the running of the statute of limitations, the court may only grant the motion if it is clear from the face of the complaint that the cause of action is time-barred." *White v. CTX Mortg., LLC*, No. 13-CV-0335-DGK, 2014 WL 1806705, at *2 (W.D. Mo. May 7, 2014) (citing *Joyce v. Armstrong Teasdale, LLP*, 635 F.3d 364, 367 (8th Cir. 2011)). With respect to fraud claims, Rule 9(b) requires a party to allege "with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "The Eighth Circuit has further explained that this rule requires the plaintiff to plead the "who, what, when, where, and how: the first paragraph of any newspaper story." *White*, 2014 WL 1806705, at *2 (quoting *Crest Constr. II, Inc. v. Doe*, 660 F.3d 346, 353 (8th Cir. 2011)) (internal quotations omitted). The same pleading standard applies to a "claim that the doctrine of fraudulent concealment tolls applicable statutes of limitations." *Summerhill v. Terminix, Inc.*, 637 F.3d 877, 880 (8th Cir. 2011).

III. Discussion

The Court will address each of Defendant Eaton's first, second, and fifth arguments in turn.

a. Indirect Purchaser

Defendant Eaton first argues that as an indirect purchaser of its Class 8 transmissions, Plaintiff is barred from stating antitrust claims. *See Illinois Brick Co., v. Illinois*, 431 U.S. 720, 746 (1977) (characterizing holding as "elevating direct purchasers to a preferred position as private attorneys general" and denying "recovery to those indirect purchasers who may have been actually injured by antitrust violations"). In response, Plaintiff admits it is an indirect purchaser but argues the Complaint adequately alleges Plaintiff's claims fall within the co-conspirator exception. Plaintiff argues, "Prime directly purchased all Class 8 transmissions from a [manufacturer/distributor] whose participation as a complete 'co-conspirator' makes the purchasing nexus direct." (Doc. #12, p. 5).

In support of its argument, Plaintiff relies upon *Insulate v. Advanced Finishing Sys., Inc.*, 797 F.3d 538, 542 (8th Cir. 2015). (Doc. #12, pp. 5-6, 8). In *Insulate* the Eighth Circuit held "indirect purchasers may bring an antitrust claim if they allege the direct purchasers are 'party to the antitrust violation' and join the direct purchasers as defendants." 797 F.3d at 542 (citing *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1170-71 & nn. 3-4 (8th Cir. 1998)). Even though the case law upon which it relies requires that direct purchasers be joined as defendants under the co-conspirator exception, Plaintiff fails to address whether naming only John Does 1-100 satisfies the requirement. The Court finds it does not.

"[A]n action may proceed against a party ***whose name is unknown*** if the complaint makes allegations specific enough to permit the identity of the party to be ascertained after reasonable discovery." *Smith v. Planned Parenthood of St. Louis Region*, 327 F. Supp. 2d 1016, 1020 (E.D. Mo. 2004) (quoting *Estate of Rosenberg by Rosenberg v. Crandell*, 56 F.3d 35, 37 (8th Cir. 1995)) (internal quotations omitted) (emphasis added). Plaintiff alleges, as it must, "John Does 1-100 include, without limitation, [manufacturers/distributors] which sold Class 8 truck transmissions directly to Prime." (Doc #1, ¶14). Plaintiff fails to inform the Court, either in the Complaint or in responding to the motion to dismiss, why it is unable to identify and name the manufacturers/distributors from whom Plaintiff purchased trucks containing Defendant Eaton's Class 8 transmissions. The names of the John Doe Defendants from whom Plaintiff purchased trucks containing Defendant Eaton's Class 8 transmissions are known to Plaintiff. As a result, naming only John Doe manufacturers/distributors is akin to not naming any manufacturers/distributors at all. Accordingly, Plaintiff's Complaint fails to allege sufficient facts for application of the co-conspirator exception to *Illinois Brick*.

Defendant Eaton also argues that because Plaintiff's antitrust claims are barred by *Illinois Brick*, Plaintiff's common-law claims based on the same alleged conduct are also barred because Plaintiff cannot use state common-law claims as an "end run" around the *Illinios Brick* prohibition. Defendant does not direct the Court to any binding Eighth Circuit precedent. The Court finds, however, that cases from other jurisdictions overwhelmingly hold that a plaintiff cannot proceed with state common-law claims, such as unjust enrichment, based on the same conduct that formed the basis of barred antitrust claims. *See United Food and Commercial Wrokers Local 1776 & Participating Employers Health and Welfare Fund v. Teikoku Pharma USA, Inc.*, 74 F. Supp. 3d 1052, 1088-89 (N.D. Cal. 2014) (collecting cases and agreeing with "majority of courts" in holding plaintiff may not "circumvent the *Illinois Brick* prohibition" through state unjust enrichment claim based on the same conduct that formed the basis of barred antitrust claims). Furthermore, Plaintiff fails to rebut Defendant Eaton's argument on this point in any respect. Accordingly, the Court finds that Plaintiff's antitrust claims are barred by *Illinois*

Brick, and Plaintiff's common law claims that are all based on the same alleged conduct are also barred.

b. Statute of Limitations

Defendant Eaton argues "all of Plaintiff's claims" are barred by the applicable statute of limitations. Even so, Defendant Eaton fails to identify which statute of limitations applies to each claim. Defendant Eaton elsewhere argues that Plaintiff's fraud, unfair competition, and unjust enrichment claims fail as a matter of law because Plaintiff does not identify which state's law applies. (Doc. #11, pp. 19-20). The Court notes that Plaintiff's Complaint repeatedly states it is brought "under the laws of the state of Missouri and under the antitrust laws of the United States[.]" (Doc. #1, ¶¶1, 3, 6). Even so, the Court will not craft for Defendant Eaton legal arguments it did not make. Accordingly, the Court finds Defendant Eaton has not carried its burden of establishing entitlement to dismissal of Plaintiff's fraud, unjust enrichment, and unfair competition claims based on the statute of limitations. However, the Court finds Plaintiff's antitrust claims are time-barred.

Plaintiff's Sherman Act and Clayton Act claims are governed by the four-year statute of limitation found at 15 U.S.C. § 15b. "Generally, [such] a cause of action . . . accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *In re Pre-Filled Propane Tank Antitrust Litigation*, 834 F.3d 943, 947 (8th Cir. 2016) (citation omitted). Plaintiff avers that the alleged improper conduct by Defendant Eaton and the unnamed manufacturers/distributors occurred between 1999 and 2006. (Doc. #1, ¶¶27, 42, 58, 63, and 70). Accordingly, Plaintiff's Sherman Act and Clayton Act claims accrued no later than 2006 and expired no later than 2010.

In apparent recognition of its deficiency, Plaintiff argues that Defendant Eaton's and the manufacturers/distributors' fraudulent concealment tolls the statute of limitations. Plaintiff argues it adequately pled fraudulent concealment in the Complaint at paragraphs 27-29. (Doc. #12, pp. 11, 14). The Court finds Plaintiff did not adequately plead fraudulent concealment.

Fraudulent concealment requires "an act of affirmative misrepresentation over and above the acts creating the cause of action." *Ripplinger v. Amoco Oil Co.*, 916 F.2d 441, 442 (8th Cir. 1990). Non-disclosure is not enough to qualify as fraudulent concealment. *Id.* As previously stated, fraudulent concealment must also be pled with the same level of particularity as a fraud claim under Rule 9(b). *Summerhill*, 637 F.3d at 880. Plaintiff's Complaint is insufficient in both respects. Plaintiff's Complaint identifies no affirmative misrepresentation by either Defendant Eaton or the unnamed manufacturers/distributors that would justify tolling the statute of limitations. Plaintiff's Complaint describes Defendant Eaton's actions as "self-concealing" but non-disclosure is insufficient to toll the statute of limitations. Nor does Plaintiff allege when, how, or through what means it discovered Defendant Eaton's and the manufacturer/distributors' alleged improper conduct.

Furthermore, Plaintiff's Complaint and its response to Defendant Eaton's motion to dismiss establish that fraudulent concealment is inapplicable because a lawsuit Plaintiff describes as involving the same "exclusionary conduct" was filed and public in 2006. Plaintiff's Complaint describes Meritor as one of Defendant Eaton's "rivals." (Doc. #1, ¶¶2-3). Plaintiff then argues in opposing Defendant Eaton's motion to dismiss, "An evidentiary record of this exclusionary conduct in the instant case is found in prior litigation. *ZF Meritor LLC and Meritor Transmission Corp. v. Eaton Corp. ("ZF Meritor"),* Civ. No. 06-623-SLR (D. Del. Aug. 4, 2011)." (Doc. #12, p. 2). Although Plaintiff provides a 2011 date for the case, it is clear from the case number alone that the case was filed in 2006, and the Court will take judicial notice of this fact. Plaintiff fails to argue how Defendant Eaton could fraudulently conceal "exclusionary conduct" that Plaintiff admits was described in a publicly-filed lawsuit a decade ago. For all of these reasons, Plaintiff's Complaint is clear on its face that Counts I-III are time-barred.

c. Fraud

Plaintiff's fraud claim in Count IV must also be dismissed for failure to satisfy the pleading standard in Rule 9(b). Plaintiff alleges, "Prime reasonably relied upon the representations directly structured by Defendant in the Class 8 tractor market place, when purchasing truck transmissions." (Doc. #1, p. 11). Plaintiff fails to identify what ***false*** representations were made, how they were made, to whom they were made, and by whom they were made. Plaintiff's Count IV is insufficiently pled and must be dismissed on this alternative basis.

IV. Conclusion

Accordingly, Eaton Corporation's Motion to Dismiss (Doc. #10) is granted.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

Dated: March 16, 2017